MOTION FILED
DEC 7 1994

No. 94-833

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ASARCO INCORPORATED,
Petitioner,

v.

LOUISIANA-PACIFIC CORPORATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To
the United States Court Of Appeals For The Ninth Circuit

Motion For Leave To File And Brief Of *Amici Curiae* American Petroleum Institute, National Association Of Chemical Recyclers, National Association Of Printing Ink Manufacturers, And National Paint And Coatings Association In Support Of Granting The Petition

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28 pp

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF GRANTING THE PETITION FOR WRIT OF CERTIORARI

The American Petroleum Institute, National Association of Chemical Recyclers, National Association of Printing Ink Manufacturers, and National Paint and Coatings Association ("Associations") respectfully move for leave of the Court to file as *Amici Curiae*, the attached brief in support of the petition for writ of certiorari submitted by ASARCO Incorporated ("ASARCO") to review the judgment of the United States Court of Appeals for the U.S. Court of Appeals for the Ninth Circuit. Counsel for Petitioner ASARCO and Respondent Industrial Mineral Products, Inc. do not object to the filing of a brief, however, counsel for Portac, Inc. has indicated that all of the remaining respondents object to the filing of the attached brief.

The American Petroleum Institute ("API") is a trade association representing companies and individuals engaged in all facets of the petroleum industry, including production, refining, transportation, and marketing of crude oil and petroleum products. API members regularly use secondary and by-product materials in the manufacture of petroleum and petrochemical products. The National Association of Chemical Recyclers ("NACR") is a trade association whose twenty-four (24) member companies recycle useful materials, primarily hazardous and non-hazardous organic solvents, from over 500,000 manufacturing and service industry generators into fuels and useful chemical products. The National Association of Printing Ink Manufacturers ("NAPIM") is a trade association whose member companies make ink and other printing supplies from virgin and recycled materials, some of which contain hazardous substances, such as toluene, methyl ethyl ketone, and heavy metals. The National Paint and Coatings Association ("NPCA") is a trade association whose members are engaged in the manufacture and sale of paints and coatings to commercial and private consumers. NPCA members use secondary and by-product materials, some of which contain hazardous substances, to manufacture their products. The decision of the U.S. Court of Appeals for the Ninth Circuit imperils the manufacture, sale and use of these companies' valuable products by threatening the imposition of liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for uses of these products that could involve the release of "hazardous substances" contained in these products into the environment. 42 U.S.C. §9607.

The Associations were not parties to this appeal. The issue involving CERCLA liability for the sale of products made of or from secondary and by-product materials is of great importance to the members of the associations. The attached brief of the Associations' identify court decisions and statutes, which contradict the reasoning and decision of the U.S. Court of Appeals

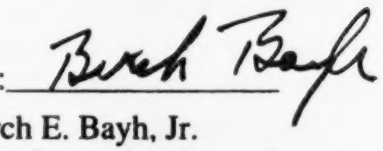
for the Ninth Circuit. The Associations' brief also details the tremendous impact that the lower court's decision could have on the burgeoning recycling industry.

None of these issues were adequately considered by the U.S. Court of Appeals for the Ninth Circuit. The lower court's decision never mentions the public policy implications of its decision for recycling, materials handling, or resource management. Nor does the lower court discuss the impact its decision will have on the Congressional goals of waste minimization or materials recovery. Finally, the lower court does not address the implications of its decision on consumers of valuable products made with and from secondary by-product materials.

The Associations' brief contains information about the extent to which construction and demolition debris, glass, off-specification materials, scrap metal, scrap tires, slag, used batteries, and used oil are beneficially recycled into new products. If the sale of these new products can become an "arrangement" for the disposal of hazardous substances, because the product are made from secondary or by-product materials, then manufacturers such as the members of the Associations will either have to use virgin materials in place of the secondary materials or forego the manufacture of the products. Moreover, using more virgin materials and recycling fewer secondary materials will increase the volume of solid and hazardous waste that must be disposed of.

Accordingly, the Associations believe they raise important issues directly relevant to the interpretation of CERCLA and the effect of the lower court's decision to impose broad liability on the recycling of valuable secondary materials. In light of the public policy implications for manufacturers and consumers, the Associations respectfully seek leave to file the attached brief.

Respectfully submitted,

By: 

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December 7, 1994

QUESTION PRESENTED

Whether manufacturers who recycle industrial by-products by selling them in good faith to other parties for productive use can be found liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) for "waste disposal," where those by-products turn out to be defective for their intended use.

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BRIEF OF *AMICI CURIAE* AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF CHEMICAL RECYCLERS, NATIONAL ASSOCIATION OF PRINTING INK MANUFACTURERS AND NATIONAL PAINT AND COATINGS ASSOCIATION IN SUPPORT OF GRANTING THE PETITION

Amici Curiae, the American Petroleum Institute, National Association of Chemical Recyclers, National Association of Printing Ink Manufacturers, and National Paint and Coatings Association ("*Amici*") respectfully ask the Court to grant the petition for writ of certiorari submitted by ASARCO Incorporated ("ASARCO") to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTEREST OF THE AMICI CURIAE

The American Petroleum Institute ("API") is a trade association representing companies and individuals engaged in all facets of the petroleum industry, including production, refining, transportation, and marketing of crude oil and petroleum products. API members regularly use secondary and by-product materials in the manufacture of petroleum and petrochemical products. The National Association of Chemical Recyclers ("NACR") is a trade association whose twenty-four (24) member companies recycle useful materials, primarily hazardous and non-hazardous organic solvents, from over 500,000 manfacturing and service industry generators into fuels and useful chemical products. The National Association of Printing Ink Manufacturers ("NAPIM") is a trade association whose member companies make ink and other printing supplies from virgin and recycled materials, some of which contain hazardous substances, such as toluene, methyl ethyl ketone, and heavy metals. The National Paint and Coatings Association ("NPCA") is a trade association whose members are engaged in the manufacture and sale of paints and coatings to commercial and private consumers. NPCA members use secondary and by-product materials, some of which contain hazardous substances, to manufacture their products.

All of the member companies of the *Amici* manufacture commercial products that are a part of the public's daily life. Materials handling practices utilized by these companies in the manufacture of these products contribute to enhanced product quality and contain consumer prices. The companies are constantly trying to improve manufacturing efficiencies and this has resulted in new uses for materials that once were discarded.

A manufacturer can be responsible under state product liability law, if it sells a defective product that results in injuries. However, under the rationale of the U.S. Court of Appeals for

the Ninth Circuit's decision, the products made by many of the *Amici's* members may be "solid wastes" because these are or are made from materials that were created during the manufacture of other products. And, the sale of these "secondary" products may result in liability under the CERCLA for both the manufacturer and user of the products, if constituents from the products enter the environment.

The *Amici* maintain that the U.S. Court of Appeals for the Ninth Circuit's decision is wrong. Congress did not intend to impose CERCLA liability on the manufacturers and users of products, including products made from secondary or recycled materials. Nor did Congress intend to define as "solid waste" those materials that are not discarded.

If the U.S. Court of Appeals for the Ninth Circuit decision were applied to them, members of the *Amici* associations will be forced to use more virgin materials and create more waste material requiring disposal. They may also have to abandon the manufacture of useful commercial products, which are made with secondary materials. In addition, members of the *Amici* that already have produced valuable products from "by-products" or secondary materials may face millions of dollars in retroactive CERCLA liability.

As this brief demonstrates the: (1) instant case represents a clear misinterpretation of CERCLA liability; (2) decision will seriously imperil commercial manufacturers in their use of secondary and recycled materials; and, (3) recycling of valuable materials have significant environmental and economic benefits to the Nation. The *Amici* respectfully urge the Court to grant the petition for writ of certiorari and address these critical legal, environmental, and economic issues.

ARGUMENT

ASARCO was found liable under CERCLA section 107(a)(3) as a person "who arranged ... for disposal ... of

hazardous substances ..." at logyards in the Pacific Northwest. 42 U.S.C. § 9607(a)(3). For over eight years, ASARCO took molten slag, produced when the company smelted copper ores at its Tacoma smelter, allowed the slag to cool, and sold the material to Black Knight, Inc, which broke the slag into pieces, sized the materials, and sold the materials commercially to logyards for use as ballast. The sized slag material served as a substitute for gravel or other weight-bearing materials. Prior to the relationship with Black Knight, ASARCO sold slag commercially to other customers for a variety of uses.

ASARCO maintained that the ballast was a useful product that had been recycled from the slag and, therefore, beyond the reach of CERCLA liability. A jury found that the material was a product under a state law.

The U.S. Court of Appeals for the Ninth Circuit agreed that hazardous substances released from products generally do not form the basis for CERCLA liability. However, because the slag was a by-product of copper smelting, the Court found that the ballast was a "waste" for purposes of CERCLA and, therefore, liability was properly imposed. *Amici* strongly believe that the U.S. Court of Appeals for the Ninth Circuit misconstrued CERCLA in making this determination.

I. The U.S. Court of Appeals for the Ninth Circuit Has Invented New Statutory Criteria and Misconstrued CERCLA Liability

In reviewing the U.S. Court of Appeals for the Ninth Circuit's opinion, it is apparent that the Court did not conduct a proper analysis of the application of CERCLA to the ballast. In essence, the Court found CERCLA liability because: (1) the ballast was derived from slag, a "by-product" of copper smelting; (2) ASARCO had disposed of this material previously before finding a commercial market for it; (3) ASARCO had to get rid of the materials; and, (4) ASARCO was primarily a copper producer and the ballast sales were of "nominal" value

to the company. The only real legal justification advanced by the Court was that "CERCLA is to be broadly interpreted to achieve its remedial goals." *Asarco Inc. v. Louisiana Pacific Corp.*, 24 F. 3d 1565, 1575 (9th Cir. 1994), *citing 3550 Stevens Creek Associates v. Barclays Bank*, 915 F.2d 1355, 1361-62, (9th Cir. 1990). [1]

The U.S. Court of Appeals for the Ninth Circuit in *Stevens Creek* and other federal circuits in other cases have found that the sale of a product, even if use of that product would result in the release of hazardous substances into the environment, does not lead to CERCLA Section 107(a)(3) "arranger" liability. [2] This is because the sale or use of a *product* is not deemed to be an "arrangement" for "disposal," which triggers CERCLA li-

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[1] In *Catellus Development Corporation v. United States*, 34 F.3d 748 (9th Cir. 1994), the Ninth Circuit stated with regard to the *ASARCO* decision:

> We held that [a] by-product of a metallurgical process, if sold, can be a product for purposes of one and a waste for purposes of the other. This is especially so given that CERCLA is to be broadly interpreted to achieve its remedial goals.' *Id.* at 1575. We focused on the fact that the slag was a 'by-product [ ] with a nominal commercial value,' and that ASARCO wanted to 'get rid of' the slag. *Id.* at 1575.
>
> ASARCO's classification of slag as both a useful product and as a waste might have been read as contradicting our statement in *Steven's Creek* that a sale of a substance is not considered a discarding of waste if a productive use is made of the substance. *See Steven's Creek*, 915 F.2d at 1362. However, *ASARCO* distinguished *Steven's Creek* by stating that it 'involved products that were produced as the producers' principal business products, not by-products that the producers had to 'get rid of.' *ASARCO* at 1575 n. 6.

[2] *Amcast Industrial Corp. v Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993); *AM International Inc. v, International Forging Equipment Corp.*, 982 F.2d 989, 999 (6th Cir. 1993); *Dayton Independent School District v. U.S. Mineral Products Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990); *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990).

ability. The term "disposal" is defined under CERCLA Section 101(29) as having the meaning that the term has under Section 1004(3) of RCRA. RCRA Section 1004(3) defines "disposal" as the "discharge, deposit, injection ... of *solid waste or hazardous waste*." 42 U.S.C. §6903(3)(emphasis added). Accordingly, to meet the "disposal" requirement of CERCLA Section 107(a)(3), the arrangement must involve the disposal of "solid or hazardous waste" from which CERCLA "hazardous substances" are released into the environment.

Under RCRA Section 1004(27), a solid waste is defined as "garbage, refuse, sludge ... or other discarded material." 42 U.S.C. § 6903(27). Slag from copper smelting and the ballast recovered from the slag is not garbage, refuse, or a sludge and, therefore, no CERCLA arranger liability exists, unless the slag produced by ASARCO was "other discarded materials." From the record of the proceedings below, the copper smelting slag was not discarded; instead, it was processed into useable logyard ballast. Nonetheless, ASARCO was found liable. Therefore, a key question raised in this case is the meaning of the term "discarded."

The U.S. Court of Appeals for the D.C. Circuit directly addressed the meaning of the term "discarded" in RCRA Section 1004(27) in *American Mining Congress v. Environmental Protection Agency*, 824 F.2d 1177 (D.C. Cir. 1987)("AMC"). The Court stated that inquiry into the meaning of a statute starts "with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." 824 F.2d at 1183, *quoting Securities Industries Ass'n v. Board of Governors*, 468 U.S. 137, 149, 104 S.Ct 2979, 2986, 82 L.Ed.2d 107 (1984) *(quoting Richards v. United States*, 369 U.S. 1, 9, 82 S.Ct. 585, 591, 7 L.Ed.2d 492 (1962). The Court found that the "ordinary, plain-English meaning" of discarded was "thrown away" or "abandoned." 824 F.2d at 1184. However, the U.S. Court of Appeals for the D.C. Circuit did not end its inquiry into the

meaning of the term "discarded" there, but reviewed "the sense in which [a term] is used ... by reference to the purpose of the particular legislation." 824 F.2d at 1185 *quoting Burnett v. Chicago Portrait Co.*, 285 U.S. 1, 6, 52 S.Ct. 275, 277, 76 L.Ed. 587 (1932). After reviewing the fabric of the RCRA statute, including its purposes and the EPA arguments to qualify the meaning of the term "discarded," the Court concluded:

> We are constrained to conclude that, in light of the language and structure of RCRA, the problems animating Congress to enact it, and the relevant portion of the legislative history, Congress clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away.

824 F.2d at 1193.

At least one member of the *Amici*, the American Petroleum Institute, was a petitioner in the *AMC* case. In its briefs, API and the other *AMC* parties described how "secondary materials" or "by-products" in their industries were not discarded, but were processed to obtain materials that were or were used to produce valuable commercial products. The U.S. Court of Appeals for the D.C. Circuit was persuaded that this further use of these materials was totally consistent with the purposes of RCRA, notwithstanding their "secondary" nature:

> EPA further contends, on a slightly different tack, that statutory provisions referring to reuse or recycling of 'solid waste' indicate Congressional intent to include in the definition of solid waste' materials not disposed of but destined for recycling in an industry's production processes. That contention, however, proves too much. One of RCRA's primary goals is to promote recovery of reusable materials that is currently being 'needlessly buried'... EPA's argument ignores this

> objective and, in so doing overlooks the natural interpretation that those statutory provisions are directed at the recycling of 'solid waste'... that present a waste management problem by having been disposed of.

824 F.2d at 1189 n.17

Under RCRA, the U.S. Court of Appeals for the D.C. Circuit is invested with the authority to review EPA's promulgation of regulations implementing the Act. RCRA Section 7006(a), 42 U.S.C. §6976(a). The Court found that for a material to be a "solid waste" under the statute, it must be discarded, and rejected EPA's attempts to qualify the clear language of the Act.

The U.S. Court of Appeals for the Ninth Circuit, without ever examining the RCRA statute, the *AMC* decision, or the meaning of the term "discarded," invented new criteria for whether a material was "discarded," i.e., the material is a "by-product," "previously disposed of," "of nominal value," and "not a principal product of the manufacturer." Regardless of whether these criteria should have been of concern to Congress, the terms employed by the court are absent from the RCRA statute and therefore, should not control the determination of what is a "solid waste" that is "disposed" for purposes of CERCLA's arranger liability. The U.S. Court of Appeals for the Ninth Circuit's attempt to "legislate" new criteria to supplant the clear meaning of the terms used in both RCRA and CERCLA statutes is ample grounds for this Court's review of the matter. [3] And, the adverse impacts that this wrongly-decided case could have

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[3] The U.S. Court of Appeals for the Ninth Circuit found it "undisputed that slag is a material exempted from RCRA's hazardous waste regulatory program under the Bevill Amendment." *ASARCO*, 24 F.3d at 1572. Accordingly, application of EPA's interpretation of, for example, the definition of the term "by-product" or the definition of "solid waste" in the RCRA hazardous waste regulations, 40 C.F.R. §§ 261.1(b)(3) & 261.2, would be erroneous. In the *Catellus* case, the Ninth Circuit suggests that current EPA

on manufacturers and consumers are compelling grounds for Court review.

II. The U.S. Court of Appeals for the Ninth Circuit's Ruling Will Seriously Discourage Recycling and the Use of Secondary Materials and Severely Impact Resource Use Decisions By Introducing The Specter Of Potential CERCLA "Waste Disposal" Liability.

Despite the economic and environmental benefits of finding productive uses for secondary industrial materials and by-products, [4] the U.S. Court of Appeals for the Ninth Circuit's decision would insulate from CERCLA liability only: (1) products made from virgin materials, or (2) products made from secondary materials that are the "principal business products" of a company. The fact that a company may be able enter new lines of commerce through the use secondary or "by-product" materials is of no consequence to the lower court. In holding so, the U.S. Court of Appeals for the Ninth Circuit has adopted a policy —"once a waste stream, always a waste stream"— regardless of whether a company makes an affirmative decision to market a valuable product from secondary materials. This is not the policy expressed in RCRA and it can only serve to inhibit legitimate recovery and recycling of secondary materials with hazardous constituents.

In enacting the Resource Conservation and Recovery Act of 1976, Congress specifically recognized several important benefits of recycling. In particular, Congress found:

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regulations under RCRA may be relevant to determinations under CERCLA. 34 F.3d at 751-52. If this were so, it could only be with regard to RCRA "hazardous waste." However, it is important to note that it was EPA's definition of "solid waste" that was before the *AMC* court and was rejected because it contradicted the "other dicarded materials" provision of the RCRA statute.

[4] See infra at p. 12.

> (1) millions of tons of recoverable material which could be used are needlessly buried each year;
>
> (2) methods are available to separate usable materials from solid waste; and
>
> (3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

42 U.S.C. § 6901 (c)(1). The Congress even put affirmative procurement requirements on the federal government to purchase products derived from recycled and secondary materials. *See* RCRA § 6002-6004, 42 U.S.C. §§ 6962-6964.[5]

Congress sought to implement this same policy under CERCLA by incorporating by reference RCRA's definitions of "disposal" and "solid waste" to circumscribe CERCLA "waste disposal" liability. As noted above, "solid waste" is defined in RCRA as "any garbage, refuse . . . and other *discarded* material." 42 U.S.C. § 6903(27) (emphasis added). Congress, in other words, sought to ensure that CERCLA "waste disposal" liability would attach only to the "affirmative act of discarding" a substance as "waste," and not to the "productive use" of that substance. *3550 Stevens Creek Assocs.*, 915 F.2d at, 1361-62

. The U.S. Court of Appeals for the Ninth Circuit never points to any section of either statute that indicates Congress meant to insulate from CERCLA liability only the "principal products" of a company that are made from secondary materials. Members of the *Amici* associations have developed processes to use secondary materials in their principal product lines, but their members are also engaged in other avenues of business. Many of these companies have subsidiaries, joint ventures, and divi-

[5] See also the Executive Order No. 12873, "Federal Acquisition, Recycling and Waste Prevention," 57 Fed. Reg. 54911 (Oct. 22, 1993).

sions that, while small in comparison to other portions of the companies, are important to the companies' balance sheet. These companies must be allowed to diversity and to develop new products to remain competitive in the world marketplace.

The sweeping nature of the U.S. Court of Appeals for the Ninth Circuit's ruling cannot be ignored. In *Catellus Development Corp. v. United States*, 34 F. 3d 748 (9th Cir. 1994), the U.S. Court of Appeals for the Ninth Circuit itself recognized that its holding might subject all sales of by-products to CERCLA "waste disposal" liability. The *Catellus* court therefore observed that "the facts in [*Asarco*] limited the scope of its statements to the situation where the by-product being sold will have to be used in its identical state until it is disposed of." Id. at 751 (emphasis added). Significantly, the *Catellus* court did not explain what it meant by the phrase "identical state." This phrase has no grounding in the statutory framework (either RCRA or CERCLA) or in EPA's RCRA regulations. The *Catellus* court's holding simply adds an additional layer of confusion to the meaning of the CERCLA phrase "arrange for disposal." This uncertainty only underscores the risks inherent in engaging in commercial recycling despite Congress' strong endorsement of such activities in RCRA.

Manufacturers constantly choose between recycling their by-products and discarding the by-products as waste. The U.S. Court of Appeals for the Ninth Circuit's ruling provides strong and generalized disincentives to recycling. The manufacturer of a product is in a very different situation than the generator of a waste. Whereas the waste generator tries to select a secure site to dispose of its waste, a manufacturer does not necessarily control who purchases its products or even whether the product is used in the manner in which it was intended. It is the waste generator that Congress sought to address in RCRA and CERCLA, not the manufacturer competing in the marketplace. To the extent that the manufacturer vends a defective product, there are strong product

liability laws in effect to address the damages caused by the defective product.

Manufacturers that produce useful by-products, which contain hazardous constituents, may now conclude that they risk broad CERCLA liability if they use materials from these by-products. If so, they are likely to use more virgin resources to replace these secondary materials. Manufacturers will also produce more waste since they are using more virgin materials and discarding all of their by-products.

This is not sound economic or environmental policy. It conflicts with expressed Congressional policies of waste minimization and sound resource use. *See* RCRA §§ 3002(b) & 8005, 42 U.S.C. §§ 6922(b) & 6985. Finally, it will harm rather than help consumers. CERCLA was not intended to become a liability vortex into which any person with even a peripheral connection to a release of hazardous substances into the environment is to be pulled. Its liability provisions are broad, but CERCLA should not be interpreted so broadly as to preclude materials recovery and management which can benefit the public.

The U.S. Court of Appeals for the Ninth Circuit did not appear to appreciate the impact that its decision could have on resource management in this country. Its efforts to ensnare ASARCO into liability at logyards should not be the rationale for controlling the use of secondary and by-product materials at manufacturing locations and commercial facilities across the Nation.

III. The U.S. Court of Appeals for the Ninth Circuit Failed to Consider the Benefits of and Extent to Which Materials Recovery and Recycling Is Operating in Today's Economy

A. The Potential to Reduce Waste, Recycle Materials, and Preserve Virgin Resources is Vast

Each year, industry generates millions of tons of waste containing hazardous constituents. In a recent report to Con-

gress, EPA found that over 19,000 large quantity generators produced approximately 197 million tons of RCRA hazardous wastes in 1989. *See* U.S. Environmental Protection Agency, *Reengineering RCRA for Recycling* Appendix D-3(Sept. 1994). The report, moreover, did not include data on wastes that are not subject to RCRA reporting requirements, such as non-hazardous and exempted wastes. In 1990, for example, steel mills produced at least 27 millions tons of scrap metal (called "home scrap") for recycling in the United States. Herbert F. Lund, *Recycling Handbook* 15.2-15.6 (McGraw Hill 1993) (hereinafter "*Recycling Handbook*"). If these materials are not kept in the stream of commerce, they must be discarded in a landfill.

In another report to Congress, EPA observed that industrial wastes, both hazardous and non-hazardous, contain "substantial quantities of metals," including high levels of copper, iron, lead, and zinc. U.S. Environmental Protection Agency, *Metal Recovery, Environmental Regulation & Hazardous Wastes* 135 (February 1994) (hereinafter "*Metal Recovery*"). Nevertheless, in 1980, approximately 10 million tons of metals were lost in industrial waste streams. *See* U.S. General Accounting Office, *Industrial Wastes: An Unexplored Source Of Valuable Minerals* 10-13 (1980). According to the General Accounting Office, these metals were worth an estimated $3 billion. *See id.*

By keeping useful secondary and by-product materials out of the waste stream, industry can both conserve limited landfill capacity and reduce the dependence of the United States on foreign resources. Chromium, cobalt, manganese, and aluminum, for example, are essential in the production of high-temperature alloys and electronics, but are not produced in appreciable quantities within the United States. *See Metal Recovery* 136. In 1985, the Congressional Office of Technology Assessment specifically suggested increased recycling as one means of decreasing import vulnerability for these and other "strategic" metals. *See* Congressional Office of Technology

Assessment, *Strategic Materials: Technologies to Reduce U.S. Import Vulnerability* 11 (May 1985). The United States similarly relies heavily on foreign countries for its source of oil, making it vulnerable to supply disruptions such as the Arab Oil Embargo of 1973. *See Metal Recovery* 136. Used oil is extensively recycled in the United States.

Finally, as Congress recognized in RCRA, heavy reliance on foreign supply also increases the national trade deficit. As the EPA observed in its June 1994 report,"[w]hen a country imports a greater value of goods than it exports, as the United States has done over the last decade, it must pay for its trade deficit by either selling assets, drawing down foreign reserves, or by borrowing the needed foreign currencies. All three methods have been used in recent years." *Id.* at 132. As the United States continues to sell income-generating assets to foreign investors, jobs are lost and earnings decrease. *See id.* In sharp contrast to this trend, domestic recycling in 1990 generated over 60 million tons of recycled metals, worth almost $37 billion. *See* U.S. Department of the Interior, *Recycled Metals In the United States* (Oct. 1993) (hereinafter "Recycled Metals").

B. Example Of Significant Recycling Activities In the United States.

American industry engages in a broad range of recycling activities and produces, directly and indirectly, a wide variety of useful products. Several significant examples of those recycling activities in the United States that involve materials that are "hazardous" or contain hazardous constituents are set forth briefly below.

1. Construction and demolition (C&D) debris:
C&D debris by weight can account for as much as 10 percent of local or regional waste streams. *See Recycling Handbook* 20.3. After magnetic and manual separation, the debris can be recycled for use as fuel wood, particle board, landscaping material, asphalt

pavement, and reinforcing steel. *See id.* C&D debris typically contains steel, copper, lead, and aluminum. *See id.* at 20.8.

2. Glass: Unlike many other recycled products, glass is 100 percent recyclable; a glass bottle, melted down and reformed, can yield an identical bottle without any loss of quality. *See id.* at 13.1. Although glass recycling is commonplace, glass often contains trace amounts of lead and arsenic is a common additive to glass. Other markets for crushed glass (called"cullet") include asphalt, soil conditioning products, construction materials, telephone poles and fence posts, and artificial sand for beach restoration. *See id.* at 13.13-13.14.

3. Off-specification materials: The RCRA regulations list scores of chemical products that, if, as manufactured, fail to meet their specifications, can nonetheless be sold and used in other applications. 40 C.F.R. §261.33. Chlorinated solvents, such as trichloroethane, for example, which can be used in the semi-conductor field only if sufficiently pure, can be used elsewhere in an off-specification form as industrial degreasing agents.

4. Scrap metal: There are, at present, a significant number of metals classified as hazardous substances that are extensively recycled in the United States, including antimony, cadmium, chromium, copper, lead mercury, nickel, selenium, silver, and zinc. *See Recycled Metals. In 1990, recycling in the United States generated over 55 million tons of recycled iron (including steel) worth approximately $25 billion. See id.* According to an EPA study, producing steel from scrap metal utilizes less energy, preserves virgin materials, reduces air and water pollution, and gener-

ates less mining and consumer wastes than virgin materials. *See Recycling Handbook* 15.8-15.9.

5. Scrap tires: Over 30 million tires are recycled each year in the United States. See *Scrap Tire Technology* 21. Current recycling activities include artificial reefs and breakwaters, erosion control (*e.g.*, support for unstable highway shoulders), highway crash barriers, athletic track surfaces, and road construction material. *See id.* at 35-51. Discarded tires typically contain trace amounts of antimony , beryllium, cadmium, chromium, mercury, and selenium. *See id.* at 136.

6. Slag: In its June 1994 report, EPA selected the International Metals Reclamation Company ("Inmetco") as one of its case study respondents. In 1992, Inmetco processed RCRA hazardous waste to produce over 28,000 tons of recycled metals. Inmetco also produced over 14,700 tons of slag, which it sold for $6-8 per ton for use as road bed aggregate or construction materials. Inmetco reported that treatment and disposal of the slag as a RCRA hazardous waste would cost the company $4-5 million annually, turning the company's 1991 profit into a loss. *See Metal Recovery* 85-86.

7. Used batteries: In 1986, 562,000 tons of lead were reclaimed through battery recycling efforts. *See Recycling Handbook* at 19.5-19.6. Used batteries typically contain a number of metals that are classified as hazardous substances, including lead, cadmium, mercury, nickel, silver, and zinc. Several organizations — including the Battery Council International, National Electrical manufacturers Association, and Battery Products Alliance — have developed model

legislation to encourage even greater battery recycling. *See id.* at 19.10.

8. Used oil: Over 2 billion gallons of lubricating oils are sold in the United States each year. Approximately 1.2 billion gallons of this oil are recycled. Oil used in internal combustion engines often contains toxic metals that are absorbed from the engine or fuel. *See* 53 Fed. Reg. 24699, 24700 (1988).

IV. The U.S. Court of Appeals for the Ninth Circuit's Decision Exacerbates Rather Than Solves the CERCLA Dilemma

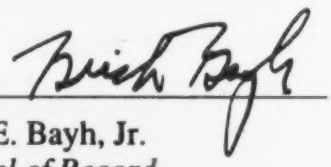
As Congress recognized in RCRA, recycling effectively reduces the amount of industrial by-products that would otherwise become "part of the waste disposal problem." *AMC*, 824 F.2d at 1186. As noted above, the amount of materials being recycled today into useful products is substantial and only likely to grow. If these materials are discarded instead of recycled, then experience indicates that a percentage of the materials will be improperly disposed of and result in future CERCLA problems.

If products containing recycled materials are presenting threats to the environment, either because they are defective or misused by the consumers of the products, the answer lies with Congress not the federal courts. No matter how good the intentions of the U.S. Court of Appeals for the Ninth Circuit, its decision, by its departure from the letter of RCRA and CERCLA, raises serious obstacles to the sound use of secondary and by-product materials. Moreover, by creating more wastes that must be discarded, the decision undermines the ultimate goals of RCRA and CERCLA — the prevention of harm to human health and the environment.

CONCLUSION

For all of the above reasons, the United States Supreme Court should grant Asarco's petition for a writ of certiorari.

Respectfully submitted,

By: 

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December 7, 1994